In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1027

ROY D. THOMAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 18) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 19, 1966. A petition for rehearing was denied on January 6, 1967. The petition for a writ of certiorari was filed on February 3, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the grand jury was improperly constituted.

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2. Whether the trial judge's warning, delivered out of the presence of the jury, that he would jail petitioner's counsel if he repeated the misconduct which had occurred in a prior related case resulted in a denial of effective representation.

3. Whether it was error to receive evidence of petitioner's admission to an I.R.S. agent investigating his income tax returns that the signature on the returns was his.

4. Whether the trial judge erred in failing to order a presentence report.

STATEMENT

After a trial by jury in the United States District Court for the Southern District of Texas, petitioner was convicted on two counts charging that he wilfully made false income tax returns for the years 1958 and 1959 by understating his gross receipts. 26 U.S.C. 7206(1). On January 26, 1966, petitioner was sentenced to eighteen months' imprisonment on Count 1, to be followed by a three-year period of probation, and to a two-year suspended term of imprisonment on Count 2. (R. 288–289, 305).

The evidence, which is not in issue, showed that petitioner, a jobber primarily in the business of selling cigarettes wholesale (R. 55, 180), sold large quantities of cigarettes for which he failed to keep invoice records. He paid his suppliers by signing over to them the checks which he received from his purchasers, thus making discovery of the unreported sales transactions less likely. In addition, he did not inform the man who prepared his income tax returns of the sales

(R. 53–56, 67, 104–119, 124–125). The sums by which his gross receipts were understated on his returns for the years 1958 and 1959 were approximately $175,000 and $166,000 respectively (R. 121–122).

ARGUMENT

1. There is no merit to petitioner's contention that the grand and petit juries were improperly constituted because selected primarily from the Texas poll-tax registration lists.[1] The fact that the Texas poll tax has been held unconstitutional, *United States* v. *Texas*, 252 F. Supp. 234 (W.D. Tex.), affirmed *per curiam*, 384 U.S. 155, does not preclude the use of the tax registration lists as a source from which federal grand and petit juries may be chosen. The court in *United States* v. *Texas, supra*, did not find that the poll tax discriminated against any identifiable group or class. Indeed, it specifically found that Negroes were not discriminated against. 252 F. Supp. at 245–246. The court struck down the law solely on the ground that the right to vote could not be conditioned upon the payment of even the minimal sum ($1.50) required by Texas' poll tax statute. 252 F. Supp. at 254–255.

In the present case, as the court of appeals held, petitioner failed to meet the burden prescribed by *Swain* v. *Alabama*, 380 U.S. 202, 205, of showing that "the grand jury pool used here did not reflect a fair

[1] It should be noted that while petitioner includes the petit jury in his attack (Pet. 2), he failed to raise any challenge to such panel in the trial court. The court of appeals thus considered only the constitution of the grand jury to be in issue before it (Pet. 18).

cross-section of the community" (Pet. 18).[2] See also *United States* v. *Bowe*, 360 F. 2d 1, 7 (C.A. 2). The use of voter registration lists as the *exclusive* source of a poll of grand and petit jurymen has been sustained. *Gorin* v. *United States*, 313 F. 2d 641, 644 (C.A. 1), certiorari denied, 374 U.S. 829. Here, as the record reveals, the lists were supplemented by names obtained from several other sources, such as newspaper articles, the city directory, the telephone book, and lists of members of various organizations. Supp. R. 6–7.[3] See *United States* v. *Van Allen*, 208 F. Supp. 331, 333 (S.D.N.Y.), affirmed in part, reversed in part on other grounds *sub nom. United States* v. *Kelly*, 349 F. 2d 720, 778–779 (C.A. 2), certiorari denied, 384 U.S. 947. In these circumstances, petitioner's assertion that the grand and petit juries were improperly constituted is without factual support.

2. Prior to the trial of the instant case, petitioner's counsel, Mr. Schwartz, had represented one Hooks in

[2] The test adopted by the Fifth Circuit is a unique one. See *Rabinowitz* v. *United States*, 366 F. 2d 34 (C.A. 5). Other circuits adhere to the more rigorous standard, consistently applied by this Court (*e.g.*, *Smith* v. *Texas*, 311 U.S. 128; *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217, 220; *Swain* v. *Alabama*, 380 U.S. 202), that before a jury will be held unlawfully constituted, there must have been a purposeful exclusion of a cognizable group or class. *E.g.*, *United States* v. *Kelly*, 349 F. 2d 720, 778–779 (C.A. 2), certiorari denied, 384 U.S. 947; *Gorin* v. *United States*, 313 F. 2d 641, 644 (C.A. 1), certiorari denied, 374 U.S. 829; *United States* v. *Henderson*, 298 F. 2d 522, 525–526 (C.A. 7), certiorari denied, 369 U.S. 878.

[3] "Supp. R." refers to the testimony of federal jury commissioners Burr and Thomas in a case entitled *United States* v. *Lucia*, made part of the record below by stipulation (R. 420–421). We are lodging a copy of the transcript of their testimony with the clerk of this Court.

a related prosecution involving Hooks' alleged wilful failure to report on his income tax return receipts from sales of tobacco. In his cross-examination of a government witness at that trial, Mr. Schwartz referred to the fact that at a previous trial of Hooks "at least nine out of the twelve [jurors] wanted to turn Mr. Hooks aloose" (R. 411). The trial judge believed that the statement had been deliberately made to prejudice the jury, and he indicated that when the case was over, he might hold Mr. Schwartz in contempt and sentence him to jail for sixty days (Pet. 9–11).

Several days later, at the outset of the present trial, Mr. Schwartz approached the bench and requested the court (the same judge who had presided at the *Hooks* trial) to ask the prospective jurors whether they had read anything in the newspapers concerning either the *Hooks* case or this one. After some colloquy, the following exchange occurred (R. 31–32):

> The COURT. It [the paper] didn't have very much, the headline was, the first part mentioned the *Schepps* case,[4] be sure that you don't—I don't want to aggravate this case and put you in for six months instead of sixty days.
>
> Mr. SCHWARTZ. We're trying to stay away from that completely, not to open the door, and we sure don't want to do it.
>
> The COURT. Open the door of the jail, that's what you'll be doing.
>
> Mr. SCHWARTZ. Well, we want to avoid it.

[4] The case referred to was a related prosecution involving one Schepps who was the president of a company called the House of Tobacco, petitioner's largest supplier of cigarettes (R. 151).

> The COURT. Not to let you out, but to take you in.
>
> Mr. SCHWARTZ. Your Honor, we want to avoid mention of the House of Tobacco or anything that can suggest Schepps.
>
> The COURT. Schepps wasn't ever mentioned; you brought out about as much about the other as they did and made that unfortunate statement.

Petitioner contends that the court's "threats" deprived him of the effective assistance of counsel at his trial (Pet. 4). The contention is without merit. A reading of the record discloses that Mr. Schwartz conducted a vigorous defense and was not restricted in the presentation of his case or in the cross-examination of witnesses. The court's remarks occurred out of the presence of the jury and were never thereafter repeated or referred to.

3. Petitioner claims that the court erred in admitting testimony of I.R.S. agent Henley that, on being asked, petitioner identified his signature on his income tax returns for 1958 and 1959 (Pet. 16–17). Petitioner, who was not then in custody, was informed that his returns were under examination (R. 100). The present claim that the admission regarding the signature was inadmissible rests on the fact that petitioner was not first advised of the right to consult counsel (R. 101). The record shows that there was no custodial interrogation and that petitioner was aware of all his rights.[5] Internal Revenue agents are under no con-

[5] A little more than a year before, the same agent had asked petitioner if he would make a statement in connection with certain transactions he had had with other persons whose tax re-

stitutional obligation to advise taxpayers not in custody that they may consult counsel. See *Kohatsu* v. *United States*, 351 F. 2d 898 (C.A. 9), certiorari denied, 384 U.S. 1011. In addition, this case was tried on January 24, 1966, prior to the date on which the rules of *Miranda* v. *Arizona*, 384 U.S. 436, have been held applicable. *Johnson* v. *New Jersey*, 384 U.S. 719.

4. Petitioner argues that the court erred in failing to order a presentence investigation and report as authorized by Fed. R. Crim. P. 32(c) (Pet. 15–16). The records reveals, however, that before pronouncing sentence the court heard evidence from petitioner's wife regarding their family situation, amount of property, and her ability to support their children (R. 272–282). The court also questioned petitioner as to certain facts brought out at trial (R. 282–285). In these circumstances, the failure to call for a presentence investigation was not an abuse of discretion. *United States* v. *Tenenbaum*, 327 F. 2d 210 (C.A. 7), certiorari denied, 377 U.S. 905; *United States* v. *Visconti*, 261 F. 2d 215 (C.A. 2), certiorari denied, 359 U.S. 954.

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turns were under examination. Petitioner declined, saying that he preferred to get legal advice before making any kind of statement (R. 93–94). A few days later, petitioner was summoned by the agent to give an affidavit. He first appeared without a lawyer but left to get one. Upon his return with counsel, he gave the affidavit (R. 97–98).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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